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IN THE

Supreme Court of the United States

October Term, 1959

No. 1014 159

[illegible] INC.,

Petitioner,

vs.

[illegible] KIDDELL, District Director of Internal Revenue, and the UNITED STATES OF AMERICA,

Respondents.

[illegible] MALAT,

Petitioner,

vs.

[illegible] A. RIDDELL, District Director of Internal Revenue, and the UNITED STATES OF AMERICA,

Respondents.

[illegible] ILSSUK ENTERPRISES, et al.,

Petitioners,

vs.

[illegible] A. RIDDELL, District Director of Internal Revenue, and the UNITED STATES OF AMERICA,

Respondents.

Petition for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term 1959

No. .....

KEVELL, INC.,

Petitioner,

vs.

ROBERT A. RIDDELL, District Director of Internal Revenue, and the UNITED STATES OF AMERICA,

Respondents.

WILLIAM MALAT,

Petitioner,

vs.

ROBERT A. RIDDELL, District Director of Internal Revenue, and the UNITED STATES OF AMERICA,

Respondents.

LOUIS LESSER ENTERPRISES, *et al.*,

Petitioner,

vs.

ROBERT A. RIDDELL, District Director of Internal Revenue, and the UNITED STATES OF AMERICA,

Respondents.

Petition for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners hereby petition this Court for a writ or writs of certiorari to the United States Court of Appeals for the Ninth Circuit.

Opinion Below.

The opinion below, a single opinion covering all three causes, appears at 273 F. 2d 440 and a copy thereof is included in the record, beginning at page 53.

Grounds for Seeking the Writ.

The writ is sought on the ground that the court below decided a federal question in a way in conflict with applicable decisions of this court. Petitioners believe, also, that the writ should be granted on the ground that the court below has decided an important question of federal law which has not been but should be settled by this court. They concede, however, that this is a ground more properly raised by respondents.

Jurisdiction.

This petition involves three suits to cancel assessments of federal income and excess profits taxes and to enjoin the collection thereof. All of the petitioners have their places of business or homes in California, and filed their returns at Los Angeles, California. The jurisdiction of the District Court was based on 28 U. S. C., Sections 1340 and 2410, and also I. R. C. 1954, Section 6213(a) (I. R. C., 1939, Sec. 272(a)(1).) Judgments of the District Court dismissing the several actions were entered on November 14, 1958.

Notices of appeal to the United States Court of Appeals for the Ninth Circuit were filed on November 24, 1958. Jurisdiction of the said court was based on 28 U. S. C., Section 1291. Judgments of the Court of Appeals affirming the several judgments of the District Court were entered December 21, 1959. [R. 74-76.] Motion to extend the time for filing a petition for rehearing in that court was filed on January 7, 1960, and pursuant thereto the time for filing such a petition was ex-

tended to March 15, 1960. Petition for rehearing in that court was filed March 14, 1960. [R. 83.] The said petition was denied on March 23, 1960. [R. 83.]

The jurisdiction of this court is based on 28 U. S. C., Section 1254(1).

Question Presented.

The ultimate question is whether the District Court had jurisdiction of the subject matter in this proceeding. The assessments involved followed notices of deficiency issued by the Commissioner of Internal Revenue under Section 272(a)(1) of the Internal Revenue Code of 1939, or Section 6212(a) of the Internal Revenue Code of 1954, and petitioners concede that the District Court had no jurisdiction of the subject matter if the "determination" of deficiency recited in each of the said notices was in fact a determination. Petitioners contend, however, that in each case the "determination" recited in the deficiency notice was not a determination at all and that in fact no determination had been made by the Commissioner of Internal Revenue. Thus the question presented resolves itself down to the narrow question of whether or not what the Commissioner did, shown in the Statement below, constituted such a determination.

Statutes Involved.

The statutory provisions directly involved in this proceeding, Sections 15(c), 129, and 272(a)(1) of I. R. C. 1939, and Sections 269, 1551, 6212(a) and 6213(a) of I. R. C. 1954, are set forth in the Appendix, *infra*.

Statement.

These three cases, as already noted, involve assessments of income and excess profits taxes. In each of the three cases a suit to cancel the assessment and enjoin the collection was filed by the respective petitioner, alleging that the assessment was invalid because there was no actual determination of a deficiency, as required by the applicable provisions of the revenue law. Respondent moved to dismiss on the ground that the court lacked jurisdiction of the subject matter because of statutory provisions prohibiting suits to restrain the assessment or collection of tax. Petitioners contended, however, that they were not within those prohibitions, because, while there were purported notices of deficiency, no deficiencies had actually been determined as required by law.

The basis of the contention that no deficiencies had actually been determined as required by law was that in each case there were in fact not one but several notices of deficiency, issued concurrently, to the same person, and based upon the same income. In each case the "determinations" asserted in the respective notices were in conflict with one another because based on different and conflicting theories of fact. Indeed, each "determination" was in a different amount. The reason given by the court below for this multiplex procedure of conflicting "determinations" is the asserted need to "protect the revenue" by preventing the bar of the statute of limitations, while a proceeding on the basis of one theory of fact is pending, from running against "determinations" on other theories.

In each case on one of the conflicting notices of deficiency no petition was filed in the Tax Court, so that the assessment involved here followed, while on the other or other notices, petitions were filed in the Tax Court and are

there pending. As to the notices which resulted in the assessments involved here, the "determinations" are shown therein as based on Sections 15(c) and 129 of I. R. C. 1939 and Sections 1551 and 269 of I. R. C. 1954.

These are the significant circumstances, as clearly shown in the opinion of the court below. The details in respect to each case appear in that opinion and we shall not burden this court by repeating them here.

Related Proceedings in the Court Below.

Because the court below, as a necessary step in its reasoning, indicated in its opinion that as a consequence of this conflict of "determinations" the burden of proof would be upon the government, these petitioners attempted in the proceedings pending in the Tax Court to obtain an order requiring the Commissioner to state fully the facts upon which he relied for his defense. That court, however, denied the application for such order, holding that the burden of proof was on the petitioners, despite the opinion to the contrary of the court below. Petitioners thereupon attempted in the court below to obtain a writ of mandamus under 28 U. S. C. Section 1651(a) requiring the Tax Court to issue such an order. The court below, however, on April 1, 1960, denied the motions for leave to file the said petitions for writ of mandamus.

We believe those petitions may have a bearing on the three injunction actions described in the "Statement" above and for that reason include them, together with the motions for leave to file them, as three additional cases within the scope of this petition for a writ of certiorari. We realize, however, that the principle expressed in Rule 30 of this court may also apply to the

court below. We therefore respectfully request that the writ of certiorari be granted as to the three injunction actions even if it is denied as to the three proceedings for mandamus.

Argument.

1. A notice of deficiency under Section 272(a)(1) of I. R. C. 1939 (Sec. 6212(a) in I. R. C. 1954) must be preceded by a *determination* of deficiency. *United States v. Price*, 80 S. Ct. 320, 328, where this court stated: "The plain sense of this provision contemplates, first, a determination, and then the sending of a notice." While such a determination is under review in the Tax Court assessment and collection may be enjoined, under the express terms of Section 272(a)(1) of I. R. C. 1939 (Sec. 6213(a) in I. R. C. 1954). *United States v. Price, supra*, 80 S. Ct. at page 328. However, assessment and collection as sanctioned by the court below, under color of one "determination" while another "determination" made concurrently against the same person based on the same income is under review in the Tax Court, would clearly be a mere evasion of those statutory provisions.

2. To allow concurrent conflicting "determinations," as the court below did, is to convert the "determination" required by the statute into a mere pleading.* If the Commissioner may concurrently make two or three conflicting "determinations" against the same person in respect to the same income, he may make a hundred such determinations. The statute itself, however, provides for only one: It provides only for *a* notice of deficiency, I. R. C. 1954, Section 6212(a)(1), or *such* notice of deficiency.

*The Tax Court has significantly referred to such "determinations" as *proposals*. *Hendrickson v. Commissioner*, 3 T. C. 231.

I. R. C. 1939, Section 272(a)(1), *United States v. Price*, *supra*, at page 327; and that notice is *the* notice authorized by the statute, I. R. C. 1954, Section 6213(a).

3. Concurrent conflicting "determinations" cannot be the determinations required here because a determination of deficiency must represent the *final decision* of the Commissioner of Internal Revenue. The Tax Court, in *Terminal Wine Co. v. Commissioner*, 1 B. T. A. 697, at page 701, expressed the principle as follows:

> "The *determination* from which a taxpayer may appeal is one which fixes the amount of *deficiency* in tax. It is the final decision by which the controversy as to the deficiency is settled and terminated, and by which a final conclusion is reached relative thereto and the extent and measure of the deficiency defined." (Italics in original.)

The foregoing view of the Tax Court is confirmed in *Hulburd v. Commissioner*, 290 U. S. 300, where this court stated, at page 306:

> "The duty to inquire and determine was imposed by the statute upon him [the Commissioner] and not upon an agency of government established for the purpose of revising his decision [referring to the Tax Court]."

To the same effect, *Flora v. United States*, 80 S. Ct. 630, 637, where the purpose of Congress in establishing the Tax Court is shown to be provision for an *appeal* by the taxpayer prior to payment.

The meaning of a "determination" of deficiency as a final decision by the officer making it is also supported by the highest court of a state. In *Appeal of Hoskins*

Manufacturing Co., 259 N. W. (Mich.) 334, there was involved a statute which required the Secretary of State "to make a 'determination' of the tax, subject to a 'redetermination' by the board on appeal. . . ." In that case, as here, the determination was *ex parte* and the redetermination was not limited to the sufficiency of the evidence before the examining officer or to a question of law. Referring to the statutory provision quoted, the Supreme Court of Michigan there stated, at page 336:

> "'Determination' implies judgment and decision after weighing the facts. The duty to fix the tax has a quasi judicial tinge."

Clearly the view expressed by the court below, in justification of the conflicting "determinations" involved here, that the Commissioner's "determination" under the statute need not be a final decision by him [R. 71], is erroneous.

4. The several sections on which the "determinations" which resulted in the assessments involved here were based, Sections 15(c) and 120 of I. R. C. 1939 and Sections 1551 and 269 of I. R. C. 1954, contain *statutory* presumptions in favor of the government. The court below, however, in order to sustain those "determinations," despite their conflict with the concurrent "determinations" pending in the Tax Court, assumed [R. 71] that the benefit of any presumption of correctness would be lost to the government. It follows that its opinion is erroneous because directly in the teeth of express statutory provisions. No interpretation of a statute can stand if it is contrary to the clear terms of the statute. *Biddle v. Commissioner*, 302 U. S. 573; *Helvering v. Sabine Transportation Co., Inc.*, 318 U. S. 306.

5. If the notices of deficiency involved here are only protective, as the court below stated [R. 72], then they are false and deceptive on their face. Nowhere in any of the notices, all shown verbatim in the record, is such "protective" character disclosed. However, a taxpayer is entitled to have the government deal honestly with him. It is the essence of due process that any process shall be genuine and show the truth of what it means. As stated in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314, 70 S. Ct. 652, 657, cited at 16A C. J. S. 811, a notice, in order to comply with the requirement of due process, "must be of such nature as reasonably to convey the required information." As C. J. S. puts it at the point above stated, and on the basis of numerous authorities, "The contents of the notice must be such as to apprise defendant of the nature of the claim against him and of the relief sought." It is further stated, at 60 C. J. S. 654: "A notice must be clear, definite, and explicit, and not ambiguous. The notice is not clear unless its meaning can be apprehended without explanation or argument."

6. As pointed out in the "Statement" above, the reason given in the opinion below for the multiplex procedure of conflicting "determinations" of tax liability by the Commissioner of Internal Revenue is the asserted need to protect the revenue by preventing the bar of the statute of limitations, while a proceeding on the basis of one theory of tax liability is pending, from running against "determinations" on other theories. The federal revenue statutes have, however, ever since 1938, made provision for these statute-of-limitations difficulties by express and particular enactment, under the heading of "Mitigation of Effect of Limitations and Other Provisions." Revenue Act of 1938, Section 820; I. R. C. 1939,

Section 3801; I. R. C. 1954, Sections 1311-1315. Those provisions were the answer of Congress to *McEachern v. Rose*, 302 U. S. 56, decided November 8, 1937. See 1939-1 C.B. (Part 2) 814-815. Certainly neither the Commissioner nor the judiciary, but only the Congress, has the power to enlarge upon them. *Iselin v. United States*, 270 U. S. 245, 250-251, 46 S. Ct. 248, 250.

7. In *Flora v. United States*, *supra*, it was pointed out by this court that after the Commissioner of Internal Revenue makes his determination the taxpayer may go in either of two directions. He may, without paying, appeal to the Tax Court. He may, on the other hand, by failing to appeal to the Tax Court allow the amount determined to be assessed, pay it in full, file claim for refund, and then sue for the refund in a district court or the Court of Claims. But he must take one procedure or the other; he cannot take both, as to either all of different parts of the tax. As this Court there stated, at page 640:

> "The result is a system in which there is one tribunal for prepayment litigation and another for post-payment litigation, with no room contemplated for a hybrid of the type proposed by petitioner."

As otherwise expressed, there is but a single cause of action and it may not be split. *Ibid.*, page 641.

Here, however, there has resulted, in respect to taxes of the same taxpayer on the same income, post-payment litigation pending in the Tax Court, and assessments which the court below holds, by denying the injunctions sought, can only be challenged by prepayment litigation. Thus the Commissioner's procedure of conflicting "determinations," approved by the court below, has resulted

in splitting the cause of action, which this Court in the *Flora* case held may not be done.

8. Respondent may in support of the opinion below assert that the Commissioner has had a practice of making such conflicting "determinations." For that purpose respondent may refer to cases in which conflicting determinations have been involved, although the issue of their validity in the light of their conflict was never raised or considered*. But practice does not sanctify error. *Biddle v. Commissioner, supra*, at page 582; *Helvering v. Sabine Transportation Company, Inc., supra*, at pp. 311-312; 55 Am. Jur. (Secs. 14, 17) 275, 279; 43 Am. Jur. (Sec. 250) 70; 65 A. L. R. 811; 73 C. J. S. (Sec. 48) 367. The rule is stated in 43 Am. Jur., at the page cited, as follows: "usage or custom cannot be availed of to enlarge the statutory powers of a public officer to include acts

*The cases cited below for that purpose are not even relevant. In one group of cases, *Overcash v. Commissioner* (C. A. 9), 22 F. 2d 708, *Commissioner v. Wilshire Holding Corp.* (C. A. 9), 244 Fed. 804, cert. denied, 355 U. S. 815, 879, and *Wilshire Holding Corporation v. Commissioner* (C. A. 9), 262 F. 2d 51, in another case, *Robinson v. Elliot* (C. A. 9), 262 F. 2d 383, and in the cases of *Commissioner v. Southwest Exploration Co.* and *United States v. Huntington Beach Co.*, 350 U. S. 308, the conflicting determinations were not against the same person, even indirectly. They were against wholly different persons in opposing positions, lessor or vendor and lessee or vendee in the *Overcash*, *Wilshire* and *Robinson* cases, and the owner and the developer of oil deposits in the *Southwest* and *Huntington* cases. In another case, *Thompson Scenic Ry. Co. v. Commissioner*, 21 B. T. A. 718, the persons to whom deficiency notices were sent were also different. Besides, those persons, three corporations, had filed a single consolidated return, and the only issue was the allocation of the consolidated tax among them. Nor was the Commissioner inconsistent. He first determined that one of the corporations was liable for the entire tax, and after finding that that corporation was not liable he made determinations dividing the tax between the other two, and the Board sustained him. In two other cases, *Hendrickson v. Commissioner, supra*, and *Commissioner v. Consolidated Electric Glass* (C. A. 6th), 265 F. 2d 320, the court decided against the Commissioner in every docket. There was no problem of inconsistency left to be decided, even if it had been raised.

otherwise unauthorized or contrary to established law or to enable the officer to perform his duties in a manner other than that prescribed by statute." No wonder here the court below treated the issue before it as one of first impression. [R. 69.]

9. This point covers the related petitions filed below for writs of mandamus to the Tax Court (*supra*, p. 5). In the said petitions the validity of the conflicting notices was assumed. The action sought of the Tax Court, an order to the Commissioner to state the facts on which he relied for his defense, is the only method available to the taxpayer for discovery in that court. *Commissioner v. Licavoli* (C. A. 6), 252 F. 2d 268. If the proceedings in that court involving those conflicting "determinations" had to be tried on the theory that the burden of proof was on petitioners, and with no detail available to petitioners of the facts on which the Commissioner relied, the trial would be grievously unfair to petitioners, regardless of subsequent review on appeal. The remedy by appeal would, therefore, be inadequate, so that writs of mandamus would be proper. See *Minor v. Atlass* (C. A. 7), 265 F. 2d 312, 313, certiorari granted, 80 S. Ct. 66, No. 150; *Berger v. United States*, 255 U. S. 22, 36; *Black v. Boyd* (C. A. 6), 248 F. 2d 156, 160-161. Of course, if this Court sustains petitioners' primary contention that the conflicting notices are invalid, then this issue of mandamus becomes moot.

Wherefore, petitioners pray that this Court issue the writ or writs of certiorari sought herein to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted.

GEORGE T. ALTMAN,
Attorney for Petitioners.

APPENDIX.

Statutes Involved:

I.R.C. 1939

Sec. 15. Surtax on Corporations.

(c) Disallowance of Surtax Exemption and Minimum Excess Profits Credit.—If any corporation transfers, on or after January 1, 1951, all or part of its property (other than money) to another corporation which was created for the purpose of acquiring such property or which was not actively engaged in business at the time of such acquisition, and if after such transfer the transferor corporation or its stockholders, or both, are in control of such transferee corporation during any part of the taxable year of such transferee corporation, then such transferee corporation shall not for such taxable year (except as may be otherwise determined under section 129(b)) be allowed either the $25,000 exemption from surtax provided in subsection (b) or the $25,000 minimum excess profits credit provided in the last sentence of section 431, unless such transferee corporation shall establish by the clear preponderance of the evidence that the securing of such exemption or credit was not a major purpose of such transfer. For the purposes of this subsection, control means the ownership of stock possessing at least 80 per centum of the total combined voting power of all classes of stock entitled to vote or at least 80 per centum of the total value of shares of all classes of stock of the corporation. In determining the ownership of stock for the purpose of this subsection, the ownership of stock shall be determined in accordance with the provisions of section 503, except that constructive ownership under section 503(a)(2) shall be determined only with respect to the individual's spouse and minor children. The provisions of

section 129(b), and the authority of the Secretary under such section, shall, to the extent not inconsistent with the provisions of this subsection, be applicable to this subsection. This subsection shall not apply to any taxable year with respect to which the tax imposed by subchapter D of this chapter is not in effect.

SEC. 129. Acquisitions Made to Evade or Avoid Income or Excess Profits Tax.

(a) Disallowance of Deduction, Credit, or Allowance.—If (1) any person or persons acquire, on or after October 8, 1940, directly or indirectly, control of a corporation, or (2) any corporation acquires, on or after October 8, 1940, directly or indirectly, property of another corporation, not controlled, directly or indirectly, immediately prior to such acquisition, by such acquiring corporation or its stockholders, the basis of which property, in the hands of the acquiring corporation, is determined by reference to the basis in the hands of the transferor corporation, and the principal purpose for which such acquisition was made is evasion or avoidance of Federal income or excess profits tax by securing the benefit of a deduction, credit, or other allowance which such person or corporation would not otherwise enjoy, then such deduction, credit, or other allowance shall not be allowed. For the purposes of clause (1) and (2), control means the ownership of stock possessing at least 50 per centum of the total combined voting power of all classes of stock entitled to vote or at least 50 per centum of the total value of shares of all classes of stock of the corporation.

(b) Power of Commissioner to Allow Deduction Etc., in Part.—In any case to which subsection (a) is applicable the Commissioner is authorized—

(1) to allow as a deduction, credit, or allowance any part of any amount disallowed by such subsection, if he determines that such allowance will not result in the evasion or avoidance of Federal income and excess profits tax for which the acquisition was made; or

(2) to distribute, apportion, or allocate gross income, and distribute, apportion, or allocate the deductions, credits, or allowances the benefit of which was sought to be secured, between or among the corporations, or properties, or parts thereof, involved, and to allow such deductions, credits, or allowances so distributed, apportioned, or allocated, but to give effect to such allowance only to such extent as he determines will not result in the evasion or avoidance of Federal income and excess profits tax for which the acquisition was made; or

(3) to exercise his powers in part under paragraph (1) and in part under paragraph (2).

SEC. 272. PROCEDURE IN GENERAL.

(a)(1) PETITION TO BOARD OF TAX APPEALS.—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with

the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

I.R.C. 1954

Sec. 269. Acquisitions Made to Evade or Avoid Income Tax.

(a) In General.—If—

(1) any person or persons acquire, or acquired on or after October 8, 1940, directly or indirectly, control of a corporation, or

(2) any corporation acquires, or acquired on or after October 8, 1940, directly or indirectly, property of another corporation, not controlled, directly or indirectly, immediately before such acquisition, by such acquiring corporation or its stockholders, the basis of which property, in the hands of the acquiring corporation, is determined by reference to the basis in the hands of the transferor corporation and the principal purpose for which such acquisition was made is evasion or avoidance of Federal income tax by securing the benefit of a deduction, credit, or other allowance which such person or corporation would not otherwise enjoy, then such deduction, credit, or other allowance shall not be allowed. For purposes of paragraphs (1) and (2), control means the ownership of stock possessing at least 50 percent of the total combined voting power of all classes of stock entitled to vote or at least 50 percent of the total value of shares of all classes of stock of the corporation.

(b) Power of Secretary or His Delegate to Allow Deduction, Etc., in Part.—In any case to which subsection (a) applies the Secretary or his delegate is authorized—

(1) to allow as a deduction, credit, or allowance any part of any amount disallowed by such subsection, if he determines that such allowance will not result in the evasion or avoidance of Federal income tax for which the acquisition was made; or

(2) to distribute, apportion, or allocate gross income, and distribute, apportion, or allocate the deductions, credits, or allowances the benefit of which was sought to be secured, between or among the corporations, or properties, or parts thereof, involved, and to allow such deductions, credits, or allowances so distributed, apportioned, or allocated, but to give effect to such allowance only to such extent as he determines will not result in the evasion or avoidance of Federal income tax for which the acquisition was made; or

(3) to exercise his powers in part under paragraph (1) and in part under paragraph (2).

(c) Presumption in Case of Disproportionate Purchase Price.—The fact that the consideration paid upon an acquisition by any person or corporation described in subsection (a) is substantially disproportionate to the aggregate—

(1) of the adjusted basis of the property of the corporation (to the extent attributable to the interest acquired specified in paragraph (1) of subsection (a)), or of the property acquired specified in paragraph (2) of subsection (a); and

(2) of the tax benefits (to the extent not reflected in the adjusted basis of the property) not

available to such person or corporation otherwise than as a result of such acquisition,

shall be prima facie evidence of the principal purpose of evasion or avoidance of Federal income tax. This subsection shall apply only with respect to acquisitions after March 1, 1954.

Sec. 1551. Disallowance of Surtax Exemption and Accumulated Earnings Credit.

If any corporation transfers, on or after January 1, 1951, all or part of its property (other than money) to another corporation which was created for the purpose of acquiring such property or which was not actively engaged in business at the time of such acquisition, and if after such transfer the transferor corporation or its stockholders, or both, are in control of such transferee corporation during any part of the taxable year of such transferee corporation, then such transferee corporation shall not for such taxable year (except as may be otherwise determined under section 269(b)) be allowed either the $25,000 exemption from surtax provided in section 11(c) or the $100,000 accumulated earnings credit provided in paragraph (2) or (3) of section 535(c), unless such transferee corporation shall establish by the clear preponderance of the evidence that the securing of such exemption or credit was not a major purpose of such transfer. For purposes of this section, control means the ownership of stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of the corporation. In determining the ownership of stock for the purpose of this section, the ownership of stock shall be determined in accordance with the provisions of section 544, except that construc-

tive ownership under section 544(a)(2) shall be determined only with respect to the individual's spouse and minor children. The provisions of section 269(b), and the authority of the Secretary under such section, shall, to the extent not inconsistent with the provisions of this section, be applicable to this section.

Sec. 6212. Notice Of Deficiency.

(a) In General.—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

Sec. 6213. Restrictions Applicable to Deficiencies; Petition To Tax Court.

(a) Time for Filing Petition and Restriction on Assessment.—Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court,